SUPREME COURT, U.S.
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No. 94-842

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

DOUGLAS EDMUND MAGILL,

Petitioner

V.

EVANS, GEORGE AND BRONSTEIN,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 94-842

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EVANS, GEORGE AND BRONSTEIN,

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BRIEF IN OPPOSITION TO PETITION

FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Evans, George and Bronstein, Respondent, invites the attention of this Court to the fact that Petitioner, Douglas Edmund Magill, has failed to preserve for consideration by this Court the issues raised in his Petition

for Writ of Certiorari. The Petition for Writ of Certiorari raises two main points. The first is: that the otherwise non-dischargeable debt of Respondent for payment of his former wife's attorney fees in a State Court divorce case was rendered dischargeable because it was assigned by Petitioner's former wife to her attorneys (Respondent) pursuant to 11 U.S.C. Sec. 523(a)(5)(A); secondly, Petitioner claims that Respondent lacked standing to file a complaint to determine non-dischargeability of debt in the United States Bankruptcy Court for the District of Maryland.

It should be observed that Petitioner failed to raise either of these issues in the bankruptcy court. Although Petitioner raised the issue of standing in the Bankruptcy Court, it was in a different context; as conceded in the Petition, the standing objection raised by Petitioner in the bankruptcy court was limited

to the sole contention that Respondent (attorneys) had no standing

> "because of the Bankruptcy filing by (Petitioner's former wife), Barbara Magill for that any monies due as a result of any award of attorney's fees would be an asset of her Bankruptcy estate and only the trustee would have standing"

to bring an action to determine non-dischargeability of that debt. (Appendix at page 1-2). Petitioner did not raise in his Petition the standing issue he now urges on this Court in his Petition, viz., that Respondent attorneys lack standing to raise the dischargeability, vel non, of an award of attorney fees in a state court divorce proceeding.

Nor did Petitioner raise before the Bankruptcy Court the issue under 11 U.S.C. Sec. 523(a)(A) that the assignment by Petitioner's former wife to Respondent attorneys rendered the (otherwise

nondischargeable debt) dischargeable in Petitioner's Chapter 7 Bankruptcy proceeding. (Appendix at page 1-4) The failure of Petitioner to raise before the bankruptcy court the issues he now asserts in the Petition warrants denial of the Petition.

The general rule is that issues must be properly raised below before they will be considered by this Court. Thus, in Sunray Mid-Continent Oil Company v. Federal Power Commission, 364 U.S. 137, 80 S.Ct. 1392, 4 L.Ed.2d 1623, rehearing denied, 364 U.S. 856, 81 S. ct 32, 5 L.Ed. 2d. 80 (1960), this Court held that a point not raised before the Federal Power Commission would not be considered under a grant of Certiorari to review the affirmance of an order of the Commission affirmed by the Court of Appeals. Similarly, in F.T.C. v. Grolier, Inc., 462 U.S. 19, 23 n. 6, 103 S. Ct. 2209, 2212 n.

6,76 L.Ed. 2d. 387 (1983), this Court declined to address an issue that was not raised before the District Court or the Court of Appeals. And in Dothard v. Rawlinson, 433 U.S. 321, 323 n.1, 17 S. Ct. 2720, 2724 n.1, 53 L.Ed. 2d. 786 (1977) the Court ruled that an issue not raised in the District Court was not properly before it on direct appeal from the District Court.

The Petitioner failed to raise before the bankruptcy court the two issues he now seeks to present to this Court. Under these circumstances, he should be deemed to have waived any complaints on these two points and the Petition for Writ of Certiorari should be denied.

ARGUMENT

I.

REASONS FOR DENIAL OF WRIT

This case presents no novel question of law, nor does it raise a matter of sufficient importance for consideration by this Court. Rule 10.1 of the Rules of the Supreme Court of the United States provides that a review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefor. Id. The basis of the Petition in this case appears to be based on the provisions of Rule 10.1.(a) which provides that:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter, or has decided a federal question in a way

> in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Not one of these bases is present in the instant case. A principal purpose for which this Court uses its certiorari jurisdiction is to resolve conflicts among the Circuit Courts of Appeal and state courts concerning the meaning of provisions of federal law. Braxton v. United States _____U.S. _____, 111 S.Ct. 1854, 114 L.Ed. 2d. 385 (1991).

Although Petitioner alludes to the fact that the decision of the Court of Appeals below "may conflict with or differ from a decision of another circuit court" (Petition at page 11), Petitioner fails to cite a single case from another jurisdiction in conflict with the decision below by the United States Court of Appeals for the Fourth Circuit. This

Court is not, therefore, presented with a situation involving a conflict between Circuit Courts of Appeal within the ambit of Rule 10.1.(a).

Secondly, the decision below is consistent with that of the Second Circuit In Re Spong, 661 F.2d 6 (2d Cir. 1981), which recognized that the dischargeability of a debt should be determined by the substance, not the form, of that liability. Petitioner in this case is seeking to avoid responsibility for a state court debt rendered in a divorce proceeding. That debt was clearly in the nature of alimony and support within the scope of 11 U.S.C. Sec. 523 (a)(5). In Re Daumit, 25 BR ;371 (Bkrtcy D. Md. 1982).

Indeed, even had no assignment occurred, Petitioner would argue that he should be relieved of his obligation. In the Petition (at pages 22-29), Petitioner argues that the

debt should be discharged even if made payable directly to his ex-wife's attorneys and not to his ex-wife who subsequently assigned it to them. All Petitioner seeks is to avoid his lawful obligation. This is not the proper forum in which Petitioner's obdurate refusal to acknowledge his lawful obligations should be approved.

II.

THE OBLIGATION OF PETITIONER IS IN THE NATURE OF ALIMONY AND SUPPORT WITHIN THE AMBIT OF 11 U.S.C. Sec. 523(a)(5).

The Petitioner appears to contend that his obligation to make payment of attorney's fees imposed upon him by the state court in a judgment of divorce did not constitute an obligation "in the nature of alimony, support and maintenance" within the scope of 11 U.S.C. Sec. 523(a)(5). As the United States Court of Appeals for the Fourth Circuit observed in In re Silansky, 897 F.2d 743(4th Cir. 1990), most courts have classified an award of attorney's fees in a divorce judgment as a non-dischargeable debt in the category of alimony, maintenance and support under Sec. 523(a)(5). See, also, In re Azia, 159 BR 71 (Bkrtcy. D.Mass. 1993). The determination of whether an attorney's fee award is non-dischargeable

because it is for the support of the spouse or child must be determined based on the character of the underlying proceedings, rather than on who was to receive the attorney's fees. In Re Ray, 153 BR 937 (D.Colo. 1992). [1]

---

[1] The district court below found that Petitioner had conceded that the fee award issued in this case was in the nature of alimony, support or maintenance. The court of appeals, below, observed below that the documents before that court supported a finding that Petitioner had conceded this issue. (Opinion at page 3).

III.

THE AWARD OF ATTORNEY'S FEES AT ISSUE IN THIS CASE IS A NON-DISCHARGEABLE DEBT OWED BY PETITIONER.

11 U.S.C., § 523(a)(5) excepts from discharge under the Bankruptcy Code, a debt:

> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, with a separation agreement, divorcee decree or other order of a court of record, determination made in accordance with State or territorial law by governmental unit, or property settlement agreement, but not to the extent that --
> (A) such debt is assigned to another entity, voluntarily by operation of law, or otherwise (other than debts assigned pursuant to Section 402(a)(26) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such state); or
> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support; . . .

It was held under Section 17a(7) of the

former Bankruptcy Act (from which current § 523(a)(5) was derived) that an award for counsel fees under a statute permitted a court to require payment of such fees by the husband (as alimony) was non-dischargeable. See, Damon v. Damon, 283 F.2d 571 (1st Cir. 1960) (applying Maine law).

As one commentator has observed, the congressional intent behind § 523 (a)(5) makes clear that what constitutes alimony, maintenance, or support will be determined under the bankruptcy laws, not State law. See 3 Collier on Bankruptcy, Paragraph 423.15(1), at page 523-117 (15th Edition, 1993), citing H.R. Rep. No. 595, 95th Cong. 2nd Sess. 363 (1977) and S. Rep. No. 989, 95th Cong., 2d. Sess. 77-79 (1978).

In the case of In Re Daumit, Supra, the United States Bankruptcy Court for the District of Maryland held that an award of

counsel fees and court costs to the debtor's spouse under a court order providing pendente lite relief was in the nature of alimony within the meaning of § 523(a)(5). The court held that although the counsel fees awarded to the debtor's former wife had been assigned by her to the firm representing her (as here) they nevertheless remained non-dischargeable under § 523 (a)(5).

The qualification in § 523 (a)(5)(A) that the non-dischargeability is lost if the debt is assigned either voluntarily or by operation of law is an innovation from practice under the former Bankruptcy Act. 4 Collier Bankruptcy Practice Guide, Paragraph 76.08 at page 76-32 (Matthew Bender, 1993). This statutory language has been construed to mean that if the spouse assigns an obligation to a creditor (as, for example, a finance company), the non-dischargeability is lost. Id., citing

In re Lovett, 6 BR 270 (Bkrtcy. Utah, 1990).

The issue of whether or not the assignment by a non-debtor spouse to her attorneys of a debt in the nature of alimony or child support would render that debt dischargeable in bankruptcy was raised in the Daumit case. Judge Mannes rejected the debtor's contention that the assignment by the wife to her attorneys rendered the debt dischargeable, saying:

> Moreover, although the counsel fees awarded defendant's ex-wife have been assigned to plaintiff (attorneys), they nevertheless remain non-dischargeable pursuant to 11 U.S.C.§ 523(a)(5)(A). The court finds no merit in defendant's contention that plaintiff's enforcement of the assignment has altered it so as to remove it from the realm of alimony. The assignment clause under § 523(a)(5)(A) does not pertain to assignment of counsel fees by a spouse to his or her attorney. Congress' concern in formulation of § 523(a)(5)(A) was not to deter all assignment of payments, but only those made to state welfare agencies.

* * * * *

> Accordingly, it is apparent that the award of counsel fees, although assigned and enforced by plaintiff, remains non-dischargeable under § 523(a)(5)(A).

25 B.R. at 373 (emphasis in the original; citation omitted). See also, In re Auer, 22 BR 274 (Bkrtcy. E.D. NY 1982) (provision of divorce decree which required debtor to pay his ex-wife's attorney's fee was in the nature of alimony and support and therefore non-dischargeable, notwithstanding its assignment to ex-wife's attorneys).

In the case of In Re Spong, Supra, the United States Court of Appeal for the Second Circuit considered this issue and concluded that it would amount to exalting form over substance to draw a distinction between counsel fees paid to a spouse and fees directed to be paid to the spouse's attorney, and concluded that the debtor's obligation to

pay the debtor's spouse's counsel fees is non-dischargeable and such fees are in the nature of alimony, maintenance or support. This point was also expressed by the United States Court of Appeals for the Eighth Circuit in the case of In Re Williams, 703 F.2d. 1055, 1057 (8th Cir. 1983), where the court said:

> Debts payable to third persons can be viewed as maintenance or support obligations; the crucial issue is the function the award was intended to serve.

(citations omitted)

There is no distinction between the award to Petitioner's ex-wife which was assigned to the Respondent in this case, and the situation in which the debtor is obligated to make payments directly to third parties. A number of courts have recognized that debts payable by a debtor to third parties may be non-dischargeable under 11 U.S.C. Sec. 523(a)(5). See e.g. In re Livengood, 157 BR 678 (Bkrtcy.

D.Idaho 1993) (mere fact that claim exists on behalf of third party, other than spouse or child, does not necessarily preclude it from qualifying as non-dischargeable "alimony, maintenance or support" obligation); In re McCord, 151 BR 915 (Bkrtcy. E.D. Mo. 1993) (debts owed to third parties may still be in nature of non-dischargeable "support or maintenance" obligation). This principle has been applied to attorney's fees. See In re Spong, supra.

CONCLUSION

Petitioner has failed to establish special and important reasons for granting the Writ of Certiorari in this case. Petitioner is unable to point to any conflict between decisions of United States Courts of Appeal. Nor does the Petition in this case raise a question which merits the consideration of this Court. For these reasons, it is respectfully submitted by Respondent that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

L. Robert Evans

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(410) 296-0200
Attorneys for Respondent

APPENDIX

APP.1

IN THE U.S. BANKRUPTCY COURT FOR THE DISTRICT OF MARYLAND

IN RE:	*	CASE 92-50923-JFS
DOUGLAS E. MAGILL	*	
Debtor	*	
* * * * * * * * * *		
EVANS, GEORGE AND	*	ADVERSARY NO.
BRONSTEIN	*	92-5241-JFS
Plaintiff	*	
v.	*	
DOUGLAS E. MAGILL	*	
Defendant	*	
* * * * * * * * * *		

ANSWER TO COMPLAINT
TO DETERMINE DISCHARGEABILITY

Douglas E. Magill, by and through his attorney, Jay Fred Cohen files this answer to the Complaint to Determine Dischargeability and says:

1. Paragraph 1, 2, 3, of the Complaint

are admitted.

2. The allegations contained in paragraph 4 are denied in part and admitted in part as follows:

a. Magill admits that he was married to Barbara Magill and divorced.

b. Magill denies all other parts of the allegations.

3. The Defendant denies the allegations contained in paragraph 5 of the Complaint.

4. The allegations contained in paragraph 6, 7 and 8 of the Complaint are denied.

AFFIRMATIVE DEFENSE

A. The Defendant further says that Barbara A. Magill filed a Petition in Bankruptcy in the United States Bankruptcy Court for the District of Maryland and listed

as one of her creditors the Plaintiff in this action. That she was discharged and her debt to the Plaintiffs in this case was also discharged.

B. The Plaintiffs have no standing in this matter because of the Bankruptcy filing by Barbara Magill for that any monies due as a result of any award of attorney's fees would be an asset of her Bankruptcy estate and only the trustee would have standing to bring this action.

WHEREFORE, the Defendant having fully answered the Complaint requests this Court to dismiss the Complaint, and for such other and further relief as justice may require.

Jay Fred Cohen
100 Church Lane
Baltimore, Maryland 21208
410-484-3050
Attorney for Defendant

APP. 4

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the aforesaid answer was mailed by first class mail to the following on this day of June, 1992.

L Robert Evans, Esquire
205 Susquehanna Bldg.
29 West Susquehanna Avenue
Towson, Md. 21204

Wilbur W. Bolton, III, Esquire
Trustee
102 South Park St.
Aberdeen, Md. 21001

_____
J. Fred Cohen

APP. 5

IN THE U.S. BANKRUPTCY COURT FOR THE DISTRICT OF MARYLAND

IN RE:	*	CASE 92-50923-JFS
DOUGLAS E. MAGILL	*	
Debtor	*	
* * * * * * * * * *		
EVANS, GEORGE AND	*	ADVERSARY NO.
BRONSTEIN	*	92-5241-JFS
Plaintiff	*	
v.	*	
DOUGLAS E. MAGILL	*	
Defendant	*	
* * * * * * * * * *		

ANSWER TO MOTION FOR SUMMARY JUDGMENT

Douglas E. Magill, by and through his attorney, Jay Fred Cohen files this answer to the Motion for Summary Judgment filed by the Plaintiff and says:

1. Paragraph 1, 2, of the Motion are

admitted.

2. The allegations contained in paragraph 3 are neither admitted or denied except that a copy proposing to be an assignment of a judgment is attached to the motion.

3. The allegations contained in paragraph 4 of the motion are denied and the defendant further states that the debt is not in the nature of support and is dischargeable in this proceeding.

4. The allegations contained in paragraph 5 are denied and further states that the claim being made is for the payment of a judgment and is fully dischargeable in this bankruptcy proceeding.

5. The allegations contained in paragraph are without merit because the defendant has filed a petition in bankruptcy

and the debt alleged to be due is fully dischargeable.

WHEREFORE, having fully answered the Plaintiff's motion for summary judgment the defendant requests this Court to deny this motion and if necessary to set this matter in for trial.

Jay Fred Cohen
100 Church Lane
Baltimore, Maryland 21208
410-484-3050
Attorney for Defendant

APP.8

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the aforesaid answer was mailed by first class mail to the following on this day of June, 1992.

L Robert Evans, Esquire
205 Susquehanna Bldg.
29 West Susquehanna Avenue
Towson, Md. 21204

Wilbur W. Bolton, III, Esquire
Trustee
102 South Park St.
Aberdeen, Md. 21001

_____
J. Fred Cohen